SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 183.

RAFAEL RODRIGUEZ AND EURIPIDES RODRIGUEZ, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

MOTION FOR REHEARING.

Now come the plaintiffs in error, by their attorneys of record, and move this honorable court to strike out the judgment of affirmance heretofore entered herein and to grant a rehearing of the cause for errors of law appearing upon the face of the opinion upon which said judgment is predicated:

The vital question in the case being whether the plaintiffs in error could avail themselves on writ of error of the motion in arrest of judgment, which appears at page 13 of the transcript of record, it had to be decided by this court—

1st. Whether said motion in arrest of judgment had been filed in time.

2d. If so, whether the objection to the action of the district court in overruling said motion had been properly preserved of record.

These two questions were disposed of in the opinion as follows:

"If, therefore, the requirement that the grand jurors should be selected by the commissioner and the clerk was a fundamental requisite, that is, if the deputy clerk, in the absence of the clerk, had no authority under any circumstances to act, then the motion in arrest of judgment did not come too late. There are authorities which give some support to the view that this requirement is of substance, and not a mere 'defect or irregularity in matter of form only' (R. S., 1025; Hulse *v.* The State, 35 Ohio St., 421). Whether this position be well taken or not we do not stop to consider; for, assuming that the motion in arrest of judgment was made in time, and assuming even that the court, as matter of law, erred in its interpretation of the statute, *still the accused cannot avail themselves here of that error; for the record does not show any exception taken to the overruling of the motion in arrest of judgment* By not excepting to the ruling of the court the accused must be held to have acquiesced in it, and to have waived the objection made to the grand jury. We perceive no reason why they could not have legally waived an objection based upon the grounds stated in the motion."

The errors complained of are:

First. That in the absence of a statute requiring a bill of exceptions to be settled in such case the established practice of the common law does not require nor permit of the noting of an exception to the overruling of a motion in arrest of

judgment, nor is the practice in the United States courts in such case otherwise.

Second. No presumption that the accused either acquiesced in the action of the district court in overruling the motion in arrest or waived the objection made to the grand jury can be predicated upon this record, because the record itself expressly recites that immediately after the overruling of said motion, on the same day (R., p. 14), the defendants filed their motion for a new trial, wherein was assigned, among others, the following error:

"13. That the court erred in overruling and denying the motion heretofore made by these defendants to arrest the judgment heretofore rendered herein against them for the reasons as set out in said motion, that the grand jury which found the bill of indictment herein against them were not as (is) in said motion set out, drawn, selected, and impaneled as required by law and were not for that reason a lawfully constituted grand jury for said purpose" (R., pp. 17–18)."

Said motion for a new trial having subsequently been "heard and submitted and overruled" (R., p. 23), the defendants petitioned for the allowance of a writ of error (R., p. 79), which was allowed (R., p. 83), and filed in the district court with their said petition for writ of error assignments of errors (R., p. 80) wherein, among others, appears the following:

"13th. That the court erred in overruling the motion heretofore made herein by these defendants to arrest the judgment herein rendered against them for that, as is set out in said motion, the grand jury which found the bill of indictment herein against them were not drawn, selected and impaneled as required by law" (R., p. 82).

Which said assignments of error were sent up to this court with the transcript of record herein and formed the basis of the argument before this honorable tribunal.

Wherefore plaintiffs in error respectfully pray that the judgment of this honorable court existing herein may be set aside and a rehearing granted.

FRANCIS H. DEXTER,
FREDERIC D. McKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiffs in Error.

ARGUMENT.

Bills of exception are the creatures of statutes and are intended to put upon the record matters occurring during the course of a trial which would not otherwise appear thereon. They have no function with respect to matters which of themselves constitute or become a portion of the record proper. Generally speaking, bills of exception have only to do with matters occurring in the course of the trial prior to verdict. In theory, at least, they are settled and signed before the jury retires from the box "to consider of its verdict," and the approved forms so declare the case to have been. If it does not appear from the certificate of the trial judge that the bills of exception were settled before the retirement of the jury, errors predicated thereon will not be considered by the appellate court.

A motion in arrest of judgment cannot be made except after verdict and before judgment or sentence. Such a motion fulfills in many respects the office of a demurrer, and in some cases it has been said to reach only such defects in the record as might have been taken advantage of by demurrer.

Except, in certain jurisdictions, where by statute the action of the trial court in passing upon a demurrer may be made the subject of review by exception properly noted, notwithstanding the aggrieved party pleads over and goes to trial, it is not customary, and established practice does not require the noting of an exception to the judgment or decision of the trial court rendered on demurrer.

In Lee *vs.* Rutledge, 51 Md., 311, where the action of the trial court in overruling a demurrer was the subject of complaint, the court of appeals said:

"The action of the court upon the demurrer has been made the ground of the first bill of exceptions. This was an oversight, as it is hardly necessary to say that questions of law, arising upon the pleadings and decided upon demurrer, are *ipso facto* apparent upon the face of the record, and are not properly the subject of bills of exception."

This ruling, which we understand to be merely declaratory of the established practice in all jurisdictions governed by common-law practice and procedure, was reiterated in the case of Davis, executor, *vs.* Carroll, 71 Maryland, 568, 569, where, in an opinion by McSherry, J., it was said:

"There are four bills of exception in the record. The first was taken to the ruling on the demurrer, and the fourth to the ruling on the motion in arrest of judgment. Such rulings cannot be brought up for review on bills of exception. *But these questions are properly before us on other parts of the record*, and will therefore be considered."

The "other parts of the record" referred to were the demurrer and the motion in arrest themselves, together with the reasons for the latter, which good practice requires to be set forth, and the action of the court in passing upon the same.

The principle upon which such decisions rest is amply set forth in the case of Cushwa *vs.* Cushwa, 9 Gill (Maryland), 242, and also in—

Newcomer *vs.* Keedy, 9 Gill, 263.
Long *vs.* Billings, 7 Washington, 267.
People *vs.* Allen, 43 N. Y., 28.
Nichols *vs.* People, 40 Illinois, 395.

In Mix *vs.* Nettleton, 29 Illinois, 245, where the action was in debt upon a written instrument, a motion for new trial and in arrest of judgment was overruled. On appeal it was contended by appellee that "the record in this case contains no exception to the decision of the court overruling the motion for a new trial and in arrest, and there is no allusion made to these motions in the bill of exceptions." But it was held by the court that—

"By the motion in arrest the question was preserved and this without excepting to overruling the motion. The decision on the motion in arrest is precisely of the same character as a judgment on a demurrer. They both alike question the sufficiency of the record to sustain a judgment."

And the judgment of the court below was reversed.

To like effect is Nichols *vs.* People, *ubi supra.*

In Miles *vs.* Buchanan, 36 Indiana, 491, 501, the court said:

"We next come to consider the assignment of errors. * * * The assignment that the court erred in overruling a motion * * * in arrest of judgment, embraces and includes every valid reason set out in such motion."

To such extent have the decisions of the various courts gone in such matter that it has been held that "the entry of final judgment is, in effect, an overruling of a motion in arrest of judgment" (McIntyre *vs.* People, 38 Illinois, 576), and the passing of sentence on the prisoner has been held a sufficient overruling of a motion in arrest (Weaver *vs.* Commonwealth, 29 Penna. St., 445).

In the absence of direct action on the motion itself, and after judgment had been entered, how would it be possible for the party aggrieved by such judgment to obtain the benefit of the points raised by the motion in arrest if an exception to the overruling of the motion must be made to appear of record?

There is no rule of the United States courts, nor indeed any authoritative decision of any such court, apart, of course, from the very decision now here under discussion, which requires or even indicates that an exception must be noted of record to the overruling of a motion in arrest of judgment before the action of the court in such particular case be reviewed; and, as is above demonstrated, the general practice in the States is to the contrary.

In this connection we call particular attention to the case of Crowley vs. United States, 194 U. S., 461, wherein the controlling question was identical with the question in the case at bar, viz., as to the validity of the grand jury by which the indictment was returned.

In the Crowley case the question was raised first by a plea in abatement and afterwards by a demurrer to the indictment. To the action of the district court in overruling first the plea in abatement and afterwards the demurrer to the indictment no exception was taken or noted of record, but the point was preserved in the assignments of error subsequently filed. Notwithstanding the absence of such exceptions, this court reviewed the rulings of the lower court and reversed its judgment.

In the case now at bar the point was first raised by the motion in arrest of judgment, a perfectly proper course of procedure according to the authorities. It was reiterated in the motion for new trial and preserved in the assignments of error. Why are not the Messrs. Rodriguez entitled to have the same course of justice meted out to them as was meted out to Crowley?

In view of the immediate filing of a motion for a new trial wherein the action of the court in overruling the motion in arrest of judgment was specifically assigned for error and the subsequent argument thereof before the court and the later reassignment of such action as error, under the writ of error from this court and its argument here, it is difficult to perceive how the plaintiffs in error could have given any more strenuous evidence of the fact that they neither acquiesced in the action of the trial judge in such connection nor intended to waive their objection made to the grand jury which returned the indictment against them.

With regard to the propriety of filing a motion for a new trial *after* a motion in arrest has been filed and overruled, it need only be said that such procedure was at best a mere impropriety which, not having been objected to by the United States prior to the submission of such motion to the court and its action thereon, must be held to have been waived.

In view of the foregoing, we earnestly submit that the opinion of this court, in so far as it at least apparently establishes a departure from accepted course of practice in the matter of motions in arrest, should be modified.

If we are correct in this, it would seem that the question as to the validity of the action of the trial judge in overruling the motion in arrest would still be before this court for decision. In such case a rehearing should be granted.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Plaintiffs in Error.